

No. 536

FILED

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# Supreme Court of the United States

On the Petition of

SIDNEY S. LEVINE as Executor of the Last Will and Testament of ANNA M. KANE, Deceased, for a Writ of Certiorari to the Court of Claims of the United States to Review the following matter:

IN THE  
COURT OF CLAIMS OF THE UNITED STATES  
DOCKET No. 47754.

SIDNEY S. LEVINE as Executor under the Last Will and Testament of ANNA M. KANE, Deceased,  
*Petitioner-Plaintiff,*

against

UNITED STATES GOVERNMENT and the WAR  
DEPARTMENT OF THE UNITED STATES  
GOVERNMENT,  
*Respondent-Defendants.*

## PETITION FOR WRIT OF CERTIORARI.

X SIDNEY S. LEVINE,  
*As Executor under the Last Will and  
Testament of Anna M. Kane, Deceased,  
In propria persona,  
Office & P. O. Address,  
277 Broadway,  
New York City 7, New York.*

H. G. MORISON  
*Acting Attorney General,  
Attorney for Defendants,  
Washington, D. C.*



# Supreme Court of the United States

On the Petition of

SIDNEY S. LEVINE, as Executor under the  
Last Will and Testament of ANNA M.  
KANE, deceased, for a writ of certiorari  
to the Court of Claims of the United  
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SIDNEY S. LEVINE, as Executor under the  
Last Will and Testament of ANNA M.  
KANE, deceased,

*Petitioner-Plaintiff,*

against

UNITED STATES GOVERNMENT and the WAR  
DEPARTMENT OF THE UNITED STATES GOV-  
ERNMENT,

*Respondent-Defendants.*

## PETITION FOR WRIT OF CERTIORARI.

The petition of SIDNEY S. LEVINE, appearing *in propria persona*, shows to this Honorable Court and alleges:

1. This is a petition for a Writ of Certiorari directed to the Court of Claims of the United States to review a determination made by it on November 1, 1948, sustaining the defendants' plea that the court was without jurisdiction to entertain the plaintiff's claim and dismissing the plaintiff's petition.

2. The petitioner-plaintiff was the executor under the Last Will and Testament of Anna M. Kane, deceased, who

was the mother of Patrick J. Kane, Jr., who died on the 24th day of June, 1945, as a result of mortal injuries received by him on the 19th day of June, 1945, while he was engaged by and under orders of the War Department of the United States in one of the operations of the war; that said Patrick J. Kane, Jr. was on or about the 19th day of May, 1944 employed at the Army Service Force, New York Port of Embarkation, New York and continued in such service until the time of his death and at the time of his death he was a Chief Engineer of the Marine Division, and what is known as the Army Transport Service; that the petitioner alleged that pursuant to certain acts of Congress "and other Governmental regulation the defendant agreed to insure the said Patrick J. Kane, Jr. in the sum of Five thousand (\$5000.) Dollars if his death was sustained as a result of the risk of war or war-like operations; that on the blank form furnished by the defendants, the said Patrick J. Kane, Jr. issued his certificate under his signature designating his mother as the beneficiary of any and all benefits payable in the event of his death and a copy of said certificate is annexed to the petition.

3. That the petition further alleged that said Patrick J. Kane, Jr. accepted said war risk insurance tendered to him by the statutes of the U. S. Government "and the rules and regulations of the Marine personnel regulations issued by the Chief of Transportation of the United States Government, and for good and valuable consideration the same became a binding contract between said Patrick J. Kane, Jr. and the defendant respondents" and that the petition further alleged "that on the 24th day of June, 1945, the said Patrick J. Kane, Jr. died as a result of the injuries received on the 19th day of June, 1945, while on duty under orders from the defendants and while engaged in a war-



like operation for the defendant and as a result of one of the risks of war"; and that the defendants failed, refused and neglected to pay said claim although due proof of loss was furnished to them.

4. On February 4, 1948, the defendants withdrew their answer and entered a plea to the jurisdiction on the ground that the jurisdiction of the Court of Claims does not extend to claims founded under the United States Compensation Act or the Act of April 11, 1942, amending the Merchant Marine Act, 1936.

5. The petitioner-plaintiff then submitted a brief and affidavit in reply pointing out that although the petitioner alleged in the petition that the defendants were liable under the statute the petition further alleged that the defendants "further agreed to insure", the life of said Patrick J. Kane, Jr., as a result of "other Governmental regulations" (Paragraph 5 of plaintiff's petition), and that "said Patrick J. Kane, Jr. accepted war risk benefits and insurance tendered to him by \* \* \* the rules and regulations of the Marine Personnel regulations issued by the Chief of Transportation of the United States Government and for good and valuable consideration the same became a binding contract between the said Patrick J. Kane, Jr. and the defendant-respondents." (Paragraph "Seventh" of the Petition.)

6. That in addition to said brief of the petitioner-plaintiff which is hereto annexed the plaintiff-petitioner submitted an affidavit in amplification of its allegation that the said Patrick J. Kane, Jr. and the U. S. Government entered into a binding contract of insurance irrespective of the United States Employers Compensation Act or any other Act of Congress and that there existed between the said

Patrick J. Kane, Jr. and the U. S. Government a common law contract. Said affidavit stating in part as follows:

"\* \* \* the deceased was employed by the War Department pursuant to certain written 'Shipping Articles' That in said Articles there is printed the words 'It is also agreed' and thereafter several blank lines are printed therein to be filled in but instead there is appended in this space a long typewritten or mimeographed statement containing among other things, deceased's insurance right as follows: 'the War Department agrees to provide benefits for injury, death, and loss of or damage to personal effects of officers and members of the crew, subject to the agreed condition that where such person so protected, or any beneficiary of such person so protected, because of the same injury, death or loss of or damage to personal effects for which benefits are payable hereunder, also becomes entitled to any statutory benefit on account of such injury, death or loss of or damage to personal effects, such person or any such beneficiary shall be entitled only (1) to the benefit herein provided, or (2) to such statutory benefit. If such person or any such beneficiary claims and receives the benefits payable hereunder, there shall be set off or credited against any such statutory benefits the amount such person or beneficiary receives hereunder. If such person or such beneficiary claims and receives any such statutory benefit, there shall be set off or credited against the benefit provided hereunder, the amount such person or beneficiary receives as statutory benefit.' " (Affidavit of Sidney S. Levine verified May 27th, 1948.)

7. It will be noted that this agreement between the said Patrick J. Kane, Jr. and the defendant respondents contemplate, that in addition to this agreement there was statutory insurance which the said Patrick J. Kane, Jr. "also becomes entitled to." This also is contained in that portion of the agreement which states "if such person or any such beneficiary claims and receives the benefits payable hereunder, there shall be set off or credited against any such statutory benefits the amount such person or bene-

ficiary receives hereunder." This is a clear indication that this was an independent contract and could be enforced irrespective of any statutory provisions provided by statute. That although this intent is clear it is respectfully submitted that the Court below erred in holding that the Court of Claims was without jurisdiction to entertain this claim by stating in part as follows:

"We conclude that just as the Suits in Admiralty Act was held to have withdrawn from the Court of Claims certain of its jurisdiction (*Matson Navigation Co. v. United States, supra*) it is logical to conclude that the Supreme Court would determine that the Merchant Marine Act of 1936, as amended by the Acts of April 11, 1942, and March 24, 1943, withholds from the court jurisdiction over claims for losses on account of insurance under said act."

8. It is respectfully submitted that what the Court of Claims lost sight of was that although the petitioner-plaintiff mentioned the Acts of Congress in his petition and affidavit, he nevertheless alleged independent of the statute a common law contract of insurance which was binding and the regulations in reference to the Merchant Marine Acts or the United States Employee Compensation Acts were mere surplusage.

9. And even in its opinion the Court below said by Jones, Chief Judge:

"This is not to say, of course, that the statutes and regulations under which it is asserted such war-risk benefits and insurance were tendered to and accepted by Kane may not have given rise to an obligation that has the force of a binding contract with him. See *Lynch v. United States*, 292 U. S. 571."

10. If this is true the petitioner is at a loss to understand why his petition was dismissed. The affidavit submitted in amplification of the complaint, although not

necessary, clearly showed an agreement of insurance between Patrick J. Kane, Jr. and the United States Government. The Government at the time the contract was made was at war and had a right to give every inducement possible to obtain Chief Engineers on the dangerous task of war operations, and the said Patrick J. Kane, Jr. may, as a patriotic duty to his country, risked his life which was eventually given for his country without any offer of insurance, yet, the Government did agree to insure him and he accepted such insurance and now the Government contends that this insurance should not be paid and that the Court of Claims is without jurisdiction to entertain the claim (a previous answer of the defendants was withdrawn in order to enter this plea to the jurisdiction).

In *U. S. v. Hodson*, 77 U. S. 395, 10 Wall, 395, the question arose whether a certain bond given to the United States Government was valid as it included certain obligations not permitted or required by statute. The defendant in that case claimed somewhat as in the case at bar that there was no statute covering all the items included in the bond although the statute covered some of the items. The court below dismissed the action on the claim of the defendant, but this Court in reversing the lower Court followed the principle as laid down in *U. S. v. Tingley*, 5 Peters 127 and referring to the Tingley case said by Swayne, J.:

“The bond was held to be valid. The decision was put upon the grounds that the Government has the capacity to make the contract, that the United States were a body politic, and that, as incident to its general right of sovereignty, it was competent to enter into any contract not prohibiting by law and found to be expedient in the just exercise of the powers confided to it by the constitution.”

Thus it was clearly settled by these two decisions that independent of any statute the Government has a right to enter into a contract with anyone and upon violation thereof by the Government, the Court of Claims is open for redress, and even in the case of *Lynch v. U. S. (Supra)*, cited by the Court below, this court said by Brandies, J.:

“\* \* \* But the policies although not entered into for gain are legal obligations of the same dignity as other contracts of the U. S. and possess the same legal incidents \* \* \* On the other hand War Risk policies being contracts are property and create vested right.”

11. Irrespective of the fact that the petition in the Court below alleged at length certain rights that the Court below may not have jurisdiction of, the petition was broad enough to include a common law contract, independent of the statutes and certainly the Court of Claims has jurisdiction in such a case.

12. The plaintiff's petition in the Court below should be liberally construed and the surplusage therein alleged may be disregarded, if there are other allegations therein which alleged a contract.

*Kansas Southern Railway v. Kau*, Valley Dist.  
233 U. S. 75.

*Swift v. U. S.*, 196, U. S. 375, 395.

13. Thus disregarding the statutory provisions for insurance the petition further alleged an agreement by the defendants to insure said Patrick J. Kane, Jr. which is enforceable in the Court of Claims.

WHEREFORE, petitioner prays this Court that a Writ of Certiorari issue to the Court of Claims of the United States for the purpose of reviewing its determination dismissing the plaintiff's petition and that the determination of the

Court of Claims be reversed and judgment directed for the plaintiff-petitioner.

Dated, N. Y., January 24, 1949.

SIDNEY S. LEVINE,  
*Petitioner.*

State of New York, }  
City of New York, } ss.:  
County of New York. }

SIDNEY S. LEVINE, being duly sworn, deposes and says, that he is the petitioner appearing *in propria persona*.

That he has read the foregoing petition for Writ of Certiorari herein; that the same is true of his own knowledge, except as to those matters to be alleged on information and belief, and as to those matters he believes them to be true.

SIDNEY S. LEVINE.

Sworn to before me this  
27th day of January, 1949.

M. Jay Meckler,

Notary Public in the State of New York,  
Residing in Kings County.

Kings Co. Clk. No. 309, Reg. No. 357-M-0.

Bronx Co. Clk. No. 75, Reg. No. 162-M-0.

N. Y. Co. Clk. No. 944, Reg. No. 555-M-0.

Commission expires March 30, 1950.

I, CHARLES V. HALLEY, JR. being duly admitted to practice in the Supreme Court of the United States, do hereby certify that I have read the foregoing petition and the same in my opinion sets forth good and meritorious grounds for a Writ of Certiorari to this Court.

CHARLES V. HALLEY, JR.,  
*Attorney for Petitioner,*  
Office & P. O. Address,  
370 East 149th Street,  
Borough of Bronx,  
City of New York.

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I, WILLARD S. HART, Clerk of the Court of Claims of the United States, do hereby certify that the foregoing contains a true and correct copy of the petition filed in the within titled matter in this Court, the plea to the jurisdiction, the petitioner's affidavit and brief in opposition to the defendant's plea for jurisdiction and the decision and opinion of this Court decided November 1, 1948.

Dated, N. Y., January       , 1949.

WILLARD S. HART,  
*Clerk of the United States  
Court of Claims.*

## COURT OF CLAIMS OF THE UNITED STATES

SIDNEY S. LEVINE as Executor under the  
Last Will and Testament of ANNA M.  
KANE, deceased,

*Petitioner-Plaintiff,*

against

UNITED STATES GOVERNMENT and the WAR  
DEPARTMENT OF THE UNITED STATES  
GOVERNMENT,

*Respondent-Defendants.*

**PETITION.**

The petition of SIDNEY S. LEVINE shows to this court and alleges:

FIRST: That on the 2nd day of February, 1946, the Surrogate's Court of the County of Bronx, State of New York, duly issued to your petitioner letters testamentary under the last will and testament of Anna M. Kane, deceased, who departed this life on the 10th day of January 1946; that your petitioner has duly qualified as such executor and a certificate of the Clerk of the Surrogate's Court of the County of Bronx, State of New York, showing that your petitioner has been named as such executor is hereto annexed and made a part hereof.

SECOND: That said Anna M. Kane was the mother of Patrick J. Kane, Jr., who died on the 24th day of June, 1945 as the result of mortal injuries received by him on the 19th day of June, 1945, while he was engaged by and under



orders of the War Department of the United States in one of the operations of the war.

THIRD: That on or about the 19th day of May, 1944, the said Patrick J. Kane, Jr. was employed at the Army Service Force New York Port of Embarkation, New York, and continued in said service until the date of his death on June 24, 1945.

FOURTH: At the time of his death the said Patrick J. Kane, Jr. was a Chief Engineer in the Marine Division of what is known as the Army Transport Service.

FIFTH: Upon information and belief, that pursuant to Public Law No. 267 of the Sixty-Fourth Congress, and other governmental regulation the defendant agreed to insure the said Patrick J. Kane, Jr., in the sum of Five Thousand (\$5,000) Dollars if his death was sustained as the result of the risk of war or war-like operations, and further agreed to insure his life for benefits of the United States Employees Compensation Act if death was sustained while in the performance of duty, as more fully provided for by subd. C of the Marine Personnel Regulations by the Chief of Transportation of the United States Government, which is as follows:

c. If disability or death is sustained by a crew member, not as a result of the risks of war or of warlike operations nor as a result of marine risks, the insurance procured from the War Shipping Administration shall not be payable, but the employee concerned shall be eligible for the benefits of the United States Employees' Compensation Act if the disability or death was sustained while in the performance of duty. On the other hand, if disability or death is sustained by a crew member as a result of the risks of war or warlike operations, the employee concerned will be eligible for both insurance payments and compensation benefits. The U. S. Employees' Compensation Commission is by statute authorized to make final decisions, there being no appeal to a higher authority. The Compensa-

tion Commission has declared that it would as a matter of policy, rule that any benefits paid under the Policy of Insurance would be offset against compensation benefits; *i. e.*, if a beneficiary or beneficiaries elect to accept a lump sum payment of \$5000.00 under the Policy of Insurance, no compensation benefits will be paid until such time as the total monthly payments prescribed in the Compensation Act would total the amount of insurance benefits paid. After the expiration of such period, should the legal beneficiary or beneficiaries named in the Compensation Act still be eligible for compensation benefits, such benefits will be extended to execute in full the statutory obligation of the United States Government by reason of Public Law No. 267—64th Congress.

SIXTH: That on a blank form furnished by the respondent-defendants, Patrick J. Kane, Jr. issued his certificate under his signature on the 4th day of September, 1944 designating his mother above named as the beneficiary of any and all war risk benefits payable in the event of his death. That a copy of said certificate is hereto annexed and marked Exhibit A and made a part hereof, as if the same were set out in full.

SEVENTH: That the said Patrick J. Kane, Jr. accepted war risk benefits and insurance tendered to him by the Statutes of the United States Government and the Rules and Regulations of the Marine Personnel Regulations issued by the Chief of Transportation of the United States Government and for good and valuable consideration the same became a binding contract between the said Patrick J. Kane, Jr. and the defendants-respondents.

EIGHTH: Upon information and belief, that on the 24th day of June, 1945, the said Patrick J. Kane, Jr. died as the result of injuries received on the 19th day of June, 1945, while on duty under orders from the defendants and while engaged in a warlike operation for the defendants and as the result of one of the risks of war.

NINTH: That due proof of loss was furnished to the defendants of said death, but the defendants have failed, refused and neglected to pay the whole or any part of said insurance or death benefit, although duly demanded.

TENTH: That your petitioner is a citizen of the United States of America, is loyal to his government and State and has no sympathies whatsoever with any of the enemies of the United States of America, and that your petitioner, the testator, and said Patrick J. Kane, Jr. are and were citizens of the United States of America and at all times bore true allegiance to the United States and never in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government.

ELEVENTH: That the plaintiff is justly entitled to recover the amount claimed as aforesaid after all debts, credits and offsets. That there has been no transfer of the whole or any part of said claim; and there has been no action on the claim taken by Congress or any Department of the Government except as aforestated.

TWELFTH: That your petitioner is an attorney and counselor-at-law duly licensed to practice in the Court of Appeals of the State of New York, which is the highest court of the State of New York; that your petitioner has also been admitted to practice law in the District Court of the Southern District of New York, and in the Circuit Court of Appeals of the Second Circuit; but your petitioner is prosecuting this petition personally and will apply for admission to the bar of this court on the first occasion that is available.

THIRTEENTH: That there is now due and owing to your petitioner from the defendants the sum of Five Thousand (\$5,000) Dollars with interest from the 24th day of June, 1945.

WHEREFORE, your petitioner prays this court for judgment against the defendant in the sum of Five Thousand (\$5,000) Dollars with interest from the 24th day of June, 1947, and for such other, further and different relief as to this court may seem just and proper.

SIDNEY S. LEVINE,  
*As Executor under the Last Will  
 and Testament of Anna M. Kane,  
 Deceased,*  
*Appearing in Person,*  
 Office & P. O. Address,  
 277 Broadway,  
 Borough of Manhattan,  
 New York 7, N. Y.

State of New York, }  
 City of New York, } ss.:  
 County of New York. }

SIDNEY S. LEVINE, being duly sworn, deposes and says that he is petitioner in the within proceedings; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

SIDNEY S. LEVINE.

Sworn to before me, this  
 15 day of July, 1947.

M. J. Meckler,  
 Notary Public, Kings County,  
 Bronx Co. Clks' No. 16, Reg. No. 162-M-8.  
 N. Y. C. Clk'. No. 220, Reg. No. 555-M-8.  
 Kings Co. Clks' No. 56, Reg. No. 357-M-8.  
 Commission expires March 30, 1948.

**EXHIBIT A.**  
**WAR DEPARTMENT**  
Certificate of  
**DESIGNATION OR CHANGE OF**  
**BENEFICIARY**

Kane, Patrick J.  
(Name of Employee)

00 0311203348  
(Certification of Identification number)  
105-10-5289  
(Social Security Number)

**WAR RISKS BENEFITS**

War Risk benefits are provided for Masters, Officers, and Crew Members (civilian employees) of the War Department. A statement of the benefits, and of the conditions under which benefits are provided, are written into and are a part of the shipping articles. You are requested to name the person or persons whom you wish to receive the benefits for loss of life. Sign this form after the beneficiary's name has been filled in.

You may designate one or more of the following persons:

- |                                |  |
|--------------------------------|--|
| (a) Your wife.                 | (e) Your grandparents and grandchildren. |
| (b) Your children.             | (f) Your aunts and uncles.               |
| (c) Your parents.              | (g) Your nephews and nieces.             |
| (d) Your brothers and sisters. |  |

**BUT NO ONE ELSE.**

I hereby designate the following person or persons whose name or names appear hereon as beneficiary or benefi-

aries of war risk benefits payable in event of my death. This designation shall continue in force for benefits now provided, and for such benefits as changed or amended from time to time by the War Department, until this designation is revoked or changed by me.

(One, two, or more beneficiaries may be named if division of benefits is desired.)

P	Name Anna Kane	Name .....	Name .....
R	Address	Address	Address
I	151 Marine St.,	.....	.....
M	City Island,	.....	.....
A	N. Y. C., N. Y.	.....	.....
R	Relationship	Relationship	Relationship
Y	Mother	Age .....	Age .....
	Age 62 Share 100%	Share .....%	Share .....%

If none of the above survive to receive payment, then such of the following as may be living:

C			
O	Name .....	Name .....	Name .....
N	.....	.....	.....
T	Address	Address	Address
I	.....	.....	.....
N	.....	.....	.....
G	Relationship	Relationship	Relationship
E	.....	.....	.....
N	Age.. Share..%	Age .....	Age .....
T		Share .....%	Share .....%

I request that my benefits for loss of life be paid in installments:

YES ..... No X

Dated at New York this 4th day of September 1944.

Witness GEO. T. BAKER

(Signature)

GEO T. BAKER

1st Lt., T. C.

(Official Title)

N. Y. P. E.

(Address)

PATRICK J. KANE

(Signature of Employee)

"LT-579" 1st Asst. Engr.

(Vessel and rating)

Same as above

(Address of Employee)

This designation revokes all previous designations and  
WILL REMAIN IN FORCE UNTIL A NEW CERTIFICATE IS EXE-  
CUTED BY THE EMPLOYEE.

This form, when completed, will be retained by the  
Employee.

No. 13050

THE PEOPLE OF THE STATE OF NEW YORK,

TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN

SEND GREETING:

KNOW YE, That we, having inspected the Records of our  
Surrogate's Court in and for the County of Bronx, do find  
that on the 2nd day of February in the year one thousand  
nine hundred and forty-six by said Court, Letters Testa-  
mentary on the estate of ANNA M. KANE, late of the County  
of Bronx, deceased, were granted unto Sidney S. Levine, of  
the County of Bronx, the Executor named in the last Will  
and Testament of said deceased, and that it does not ap-  
pear by said Records that said Letters have been revoked.

IN TESTIMONY WHEREOF, we have caused the Seal of the  
Surrogate's Court of the County of Bronx to be hereunto  
affixed.

WITNESS, HON. ALBERT H. HENDERSON, Surrogate of our  
said county, in The City of New York, the 2nd day of Feb-

ruary in the year of our Lord one thousand nine hundred and forty-six.

(SEAL)

THOMAS F. FITZPATRICK,  
*Clerk of the Surrogate's Court.*

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IN THE  
COURT OF CLAIMS OF THE UNITED STATES

---

No. 47754

SIDNEY S. LEVINE, Executor Under the Last Will and Testament of ANNA M. KANE, Deceased,  THE UNITED STATES,	v.	Plaintiff,   Defendant.
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**PLEA TO THE JURISDICTION.**

(Filed February 4, 1948)

Now comes the defendant and pleads to the jurisdiction of the court on the ground that said jurisdiction does not extend to claims founded on the United States Employees' Compensation Act, or the Act of April 11, 1942, amending the Merchant Marine Act, 1936.

H. G. MORISON,  
*Acting Assistant Attorney General.*

EDWARD L. METZLER,  
*Attorney.*



IN THE  
COURT OF CLAIMS OF THE UNITED STATES

Docket No. 47754.

SIDNEY S. LEVINE, as Executor under the Last Will  
and Testament of ANNA M. KANE, deceased,

*Petitioner-Plaintiff,*

against

UNITED STATES GOVERNMENT and the WAR DEPART-  
MENT OF THE UNITED STATES GOVERNMENT,

*Respondent-Defendants.*

**Affidavit of Sidney S. Levine.**

State of New York, {  
County of New York, { ss.:

SIDNEY S. LEVINE, being duly sworn, deposes and says that he is the petitioner herein and is a member of the Bar of the State of New York, the District Court of the United States for the Southern District of New York, and the Circuit Courts of Appeals of the Second and Third Circuits of the United States, and in order to save the estate as much expense as possible, deponent is appearing in person in this action.

Ordinarily, on a motion of this character, attacking the jurisdiction of the court, no affidavit would be necessary, but there are certain conclusions of fact alleged in the peti-

tion that, if amplified at this time, will enlighten the court on the issues involved herein.

The Government bases its argument solely on the proposition that the petitioner is seeking recovery only under Sections 1128c and 1128d of the U. S. Code. This is not so.

The "Fifth" paragraph of the petition, after alleging that the deceased was insured under Public Law No. 267 of the Sixty-Fourth Congress, proceeds further to allege that the deceased was insured pursuant to "other governmental regulations".

Then Paragraph "Seventh" of the complaint proceeds to allege that the defendants, independent of any statutory rights, agreed to insure the deceased and that there was "a binding contract between the deceased and the defendants" to that effect.

It is to amplify this agreement that deponent submits this affidavit. In the annexed brief deponent has cited authorities showing that if this claim is based purely on a common law contract, this court has full jurisdiction to entertain same.

Deponent will be able to submit proof on the trial that the deceased was employed by the War Department pursuant to certain written "Shipping Articles". That in said Articles there is printed the words "It is also agreed" and thereafter several blank lines are printed therein to be filled in but instead there is appended in this space a long type-written or mimeographed statement containing, among other things, deceased's insurance right as follows:

"the War Department agrees to provide benefits for injury, death, and loss of or damage to personal effects of officers and members of the crew, subject to the agreed condition that where such person so protected, or any beneficiary of such person so protected, because

of the same injury, death, or loss of or damage to personal effects for which benefits are payable hereunder, also becomes entitled to any statutory benefit on account of such injury, death, or loss of or damage to personal effects, such person or any such beneficiary shall be entitled only (1) to the benefit herein provided, or (2) to such statutory benefits. If such person or any such beneficiary claims and receives the benefits payable hereunder, there shall be set off or credited against any such statutory benefits the amount such person or beneficiary receives hereunder. If such person or such beneficiary claims and receives any such statutory benefit, there shall be set off or credited against the benefit provided hereunder, the amount such person or beneficiary receives as statutory benefit."

Thus it is manifest from this agreement of insurance that there is in this particular case a dual or alternative right of insurance, one under the statute and the other under simple contract. Thus if the petitioner relies solely on contract the Government's argument falls flat, as the entanglements and limitations of the statute do not apply.

If this Learned Court is of the opinion that the facts herein set forth should have been set forth in the petition, petitioner respectfully prays that leave to amend his petition should be granted.

SIDNEY S. LEVINE.

Sworn to before me this  
27 day of May, 1948.

M. JAY MECKLER,

Notary Public in the State of New York.

Residing in Kings County.

Kings Co. Clk. No. 309, Reg. No. 357-M-0.

Bronx Co. Clk. No. 75, Reg. No. 162-M-0.

N. Y. Co. Clk. No. 944, Reg. No. 555-M-0.

Commission expires March 30, 1950.

*To Be Argued by the Petitioner  
in Person.*

IN THE  
COURT OF CLAIMS OF THE UNITED STATES

---

DOCKET No. 47754.

---

SIDNEY S. LEVINE as Executor under the  
Last Will and Testament of Anna M.  
Kane, deceased,

*Petitioner-Plaintiff,*

against

UNITED STATES GOVERNMENT and the WAR  
DEPARTMENT OF THE UNITED STATES GOV-  
ERNMENT,

*Respondent-Defendants.*

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**BRIEF IN OPPOSITION TO THE DEFENDANTS'  
PLEA TO THE JURISDICTION.**

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**Statement.**

The petition was filed herein on the 17th day of July, 1947. On the 26th day of August, 1947, the defendants filed a general traverse to the petition herein, denying "each and every allegation therein contained". About five months thereafter and on January 20, 1948 the defendants made a motion to withdraw the general traverse and filed the plea to the jurisdiction.

### **The Facts.**

The deceased was employed by the War Department as a Chief Engineer in the Marine Division in what is known as the Army Transport Service (Pars. 3 and 4 of Petition).

Pursuant to such employment the defendants agreed to insure the deceased's life in the sum of \$5,000 as the result of the risk of war or warlike operations (Par. 5 of the Petition).

That while on duty on the 19th day of June, 1945 and while engaged in warlike operations for the defendant as one of the risks of war, the deceased was injured and as a result of such injuries, died on the 24th day of June, 1945 (Par. 8 of Petition).

That the petitioner as executor of the deceased filed due proof of loss of claim for the said insurance but the defendants refused to pay same which resulted in this action (Petition, Par. 9).

### **POINT I.**

**It can be fairly inferred from the petition that the petition is based purely upon a contract of insurance.**

Independent of any statute, this claim is based upon a simple contract of insurance, therefore there is no legal bar to the jurisdiction of this court to entertain the petitioner's claim. There may be some weight to the defendants' contention that this court is barred from entertaining a claim when based upon Section 1128-g of the United States Code. The plaintiff, the petitioner, has gone further and alleged a common law contract of insurance, aside from any act of Congress. There is nothing to prevent the War Department from making a contract with a citizen in the time of war to purchase merchandise, ammunition or to employ

men for the Army Transport Service. In making a contract of employment, the War Department has the right to give inducements which may include insurance on the life of the employee. As a matter of fact the U. S. Government has inherent power to make a valid contract.

*United States v. Hodson*, 77 U. S. 395, 10 Wall 395.

In that case the U. S. Supreme Court held that the United States Government has incident to its general rights of sovereignty the right to enter into any contract not prohibited by law and found to be expedient in the jury exercise of the powers confided to it by the Constitution.

Certainly there can be nothing objectionable in the defendants entering into a contract of insurance. In the Articles of Shipment with the deceased the War Department agreed independent of any statute to provide death benefits "for injury, death and loss or damage to personal effects" of the deceased, and the contract specifically stated that it was independent of any statutory benefit and that if the beneficiary of the deceased claimed the statutory benefits, it was thereafter to be offset against the benefits under the independent contract made by the War Department with the deceased. (See Affidavit of petitioner annexed to this brief.)

The cases of *Posey v. Tennessee Valley Authority*, 93 Fed. 2d 726 and *Thomason v. Works Project Administration*, 47 F. Supp. 51, cited by the defendants are not in point for the reason that those cases involved proceedings to recover under the statute while the case at bar is to recover under a common law contract of insurance and is not limited by any provisions of the statute. Even on page 21 of the Government's brief the defendants admit that the "petition does not expressly state the fact it is founded on the Act of April 11, 1942". Therefore, the provisions of Section 1128-d of 46 U. S. Code relegating any dispute of a claim made under

said Code to the District Court of the United States sitting in admiralty is not applicable to the case at bar.

The forum for the case at Bar is this court.

*Petrin v. United States*, 90 Court of Claims, 670;

*McElhany v. United States*, 101 Court of Claims, 286.

Under the Tucker Act, Judicial Code Sec. 145, 28 U. S. C. A. Sec. 250, the petitioner in filing its petition in this court was fully within his rights, as it was held by this court in *Petrin v. United States* (*supra*) that this court has "jurisdiction to hear and determine claims founded on any contract express or implied with the Government of the United States" and *McElhany v. United States*, *supra*, went so far as to hold that this court had jurisdiction to adjudge the rights under a war risk policy, when the statute under which payment is due and payable, are not involved in the claim in suit.

It must be remembered that when the defendant withdrew its answer to the petition herein it admitted the truth of each and every allegation of the petition and each and every favorable inference that can be drawn therefrom in favor of the petitioner.

Therefore it admits that the deceased was insured pursuant to a contract and that the deceased suffered death while in warlike operations and his beneficiary is entitled to recover under the terms of his contract of insurance.

Admitting the liability that is charged in the petition, this court clearly has power to render judgment in favor of the petitioner under the authority of *McElhany v. United States*, *supra*, for in that case it was distinctly held by this court that it has jurisdiction of a claim based upon withholding of the government of (1) disability benefit payments properly adjudged to be due to a veteran, and (2) payment

admittedly due under the War Risk Policy, when the statute under which such payments are due and payable are not involved in the claim in suit. Assuming, but not admitting, that the petitioner was claiming solely under the statute, then the plaintiff could, nevertheless, recover, as the defendants having withdrawn their answer, there is no dispute of liability.

## POINT II.

**Should the court feel that an independent contract of insurance is sufficiently alleged in the present petition, the plea to the jurisdiction should be denied, and if the court feels that the conclusions of fact should be elaborated upon in the petition, leave should be granted to amend the petition.**

Even under the contract of insurance the deceased had with the War Department, the rights of the deceased under the statute were clearly differentiated from those under the independent contract of insurance the War Department made with him. And it further appears from the contract that great liberality should be given to the beneficiary of the deceased in electing under what theory she could seek recovery, and even provided that what was collected under the statute should be offset against what was collected if recovery was sought under the independent contract of insurance and vice versa. This court is not ousted of any jurisdiction of this claim merely because the petitioner refers to statutory rights in addition to the contractual rights of the deceased.

Respectfully submitted,

SIDNEY S. LEVINE,

*Executor under the Last Will and  
Testament of Anna M. Kane,  
Petitioner and Plaintiff.*



IN THE  
COURT OF CLAIMS OF THE UNITED STATES

No. 47754

---

(Decided November 1, 1948)

SIDNEY S. LEVINE, as Executor Under the Last Will  
and Testament of ANNA M. KANE, Deceased,

v.

THE UNITED STATES.

*Sidney S. Levine in propria persona.*

*Mr. Edward L. Metzler, with whom was Mr. Assistant  
Attorney General H. G. Morison, for defendant.*

ON PLEA TO THE JURISDICTION

OPINION

JONES, *Chief Judge*, delivered the opinion of the court:

This case is before us on defendant's plea to the jurisdiction of the court. Plaintiff, as executor under the last will and testament of Anna M. Kane, deceased, by his petition seeks to recover \$5,000 which plaintiff claims was due and owing from defendant to said decedent as beneficiary of War Risk Insurance on the life of her son, Patrick J. Kane, Jr. The latter is alleged to have died on June 24, 1945, as a result of mortal injuries received by him on June 19, 1945, while employed in a civilian capacity as a chief engineer in the Marine Division of the Army Transport Service, War Department.

Defendant conceiving the claim as set forth in plaintiff's petition to be a claim for certain benefits available only by virtue of and pursuant to the provisions of the United States Employees' Compensation Act of September 7, 1916, 39 Stat. 742, as amended (5 U. S. C. Chapter 15), and the Act of April 11, 1942, 56 Stat. 214, amending the Merchant Marine Act of 1936 (46 U. S. C. Sections 1128-1128h), denies the jurisdiction of this court to entertain a claim founded upon either of these statutes. Upon the basis of its plea defendant asks that the petition be dismissed.

Plaintiff seeks to avoid the plea to the jurisdiction primarily on the ground that the petition asserts a claim based upon a simple contract of insurance independent of any statute. The necessity thus arises to examine in some detail the allegations of the petition in order to ascertain the exact nature of the claim asserted before considering whether the petition must be dismissed.

The petition alleges that on or about the 19th day of May 1944, Patrick J. Kane, Jr., was employed at the Army Service Force New York Port of Embarkation, New York, and continued in said service until the date of his death on June 24, 1945; that "pursuant to Public Law No. 267 of the Sixty-fourth Congress" (i. e., the United States Employees' Compensation Act of September 7, 1916, 39 Stat. 742, 5 U. S. C. Chap. 15) "and other governmental regulation the defendant agreed to insure the said Patrick J. Kane, Jr., in the sum of Five Thousand (\$5,000) Dollars if his death was sustained as the result of the risk of war or war-like operations, and further agreed to insure his life for benefits of the United States Employees' Compensation Act if death was sustained while in the performance of

duty, as more fully provided for by subdivision C of the Marine Personnel Regulations by the Chief of Transportation of the United States Government \* \* \*." The petition further alleges that Patrick J. Kane, Jr., accepted such war risk benefits and insurance "tendered to him by the Statutes of the United States Government and the Rules and Regulations of the Marine Personnel Regulations issued by the Chief of Transportation"; that his death resulted from injuries received while on duty under orders from defendant and while engaged in a warlike operation for defendant and as the result of one of the risks of war; but that, notwithstanding due proof of loss was furnished, defendant has refused to pay the whole or any part of said insurance or death benefits.

Annexed to the petition, as Exhibit A thereof, is a copy of War Department Certificate of Designation or Change

<sup>1</sup> Subdivision C of said Marine Personnel Regulations is set forth in the petition as follows:

"If disability or death is sustained by a crew member, not as a result of the risks of war or of warlike operations nor as a result of marine risks, the insurance procured from the War Shipping Administration shall not be payable, but the employee concerned shall be eligible for the benefits of the United States Employees' Compensation Act if the disability or death was sustained while in the performance of duty. On the other hand, if disability or death is sustained by a crew member as a result of the risks of war or warlike operations, the employee concerned will be eligible for both insurance payments and compensation benefits. The U. S. Employees' Compensation Commission is by statute authorized to make final decisions, there being no appeal to a higher authority. The Compensation Commission has declared that it would as a matter of policy, rule that any benefits paid under the Policy of Insurance would be offset against compensation benefits; *i. e.*, if a beneficiary or beneficiaries elect to accept a lump-sum payment of \$5,000 under the Policy of Insurance, no compensation benefits will be paid until such time as the total monthly payments prescribed in the Compensation Act would total the amount of insurance benefits paid. After the expiration of such period, should the legal beneficiary or beneficiaries named in the Compensation Act still be eligible for compensation benefits, such benefits will be extended to execute in full the statutory obligation of the United States Government by reason of Public Law No. 267, 64th Congress."

of Beneficiary purporting to have been executed by Patrick J. Kane, Jr., on September 4, 1944, in favor of his mother, wherein it is recited that "War Risk benefits are provided for masters, officers, and crew members (civilian employees) of the War Department. A statement of the benefits, and of the conditions under which benefits are provided, are written into and are a part of the shipping articles."<sup>2</sup>

As heretofore noted, plaintiff's principal insistence in opposing the plea to the jurisdiction is that these allegations state a claim based upon a common law contract of insurance not dependent upon any act of Congress;<sup>3</sup> therefore, that this court's jurisdiction to entertain plaintiff's claim rests upon its general jurisdiction under Section 145 of the Judicial Code, 28 U. S. C. 250, to hear and determine claims

<sup>2</sup> By affidavit accompanying his brief in opposition to defendant's plea to the jurisdiction of the court plaintiff offers to show that in the Shipping Articles under which Patrick J. Kane, Jr., was employed by the War Department it was recited that the War Department agrees to provide benefits for injury, death, and loss of or damage to personal effects of officers and members of the crew, subject to the agreed condition that where such person so protected, or any beneficiary of such person so protected, because of the same injury, death or loss of or damage to personal effects for which benefits are payable hereunder, also becomes entitled to any statutory benefit on account of such injury, death, or loss of or damage to personal effects, such person or any such beneficiary shall be entitled only (1) to the benefit herein provided, or (2) to such statutory benefit. If such person or any such beneficiary claims and receives the benefits payable hereunder, there shall be set off or credited against any such statutory benefits the amount such person or beneficiary receives hereunder. If such person or such beneficiary claims and receives any such statutory benefit, there shall be set off or credited against the benefit provided hereunder, the amount such person or beneficiary receives as statutory benefit."

<sup>3</sup> It is apparent that the reference to certain "statutory benefits," in the language quoted in the preceding footnote, lies at the bottom of plaintiff's contention that the insurance benefits elsewhere referred to therein are rights existing independent of statute and resting solely upon simple contract. Assuming that these latter are not "statutory benefits" in the sense in which such term is here used, they are nevertheless, as will become evident later in our discussion of the Merchant Marine Act of 1936, as amended by the Act of April 11, 1942, 46 U. S. C. 1128, rights to some extent dependent upon statute for their existence.

founded upon any contract, express or implied, with the Government of the United States, without regard to such limitation respecting the forum for determining insurance claims against the Government as may be imposed by Section 1128d of Title 46 U. S. C.

It seems to us that this is an over-simplification of the issue which confronts us. If we give to the allegations of the petition (and as well to the statements contained in the affidavit by which plaintiff has undertaken to amplify his petition) the broadest intendment of which they are reasonably susceptible, the petition still fails to reveal a claim founded upon a simple contract the terms of which must not in some part be found in the statutes and the regulations pursuant to which the several benefits claimed by plaintiff were made available. The alleged undertakings by defendant to insure, and the war-risk benefits and insurance alleged by plaintiff to have been tendered to Kane, and by him accepted, in connection with his employment, are designated by the petition itself as those "tendered to him" by the statutes of the United States and the Marine Personnel Regulations. The assertion is made in plaintiff's brief that in the Articles of Shipment with the deceased (see footnote 2, *ante*) "the War Department agreed independent of any statute to provide death benefits." The portion of the Shipping Articles set forth in plaintiff's affidavit to supplement his petition scarcely warrants this contention. We cannot agree with plaintiff's contention that defendant, by withdrawing its answer to the petition in order to plead to the jurisdiction of the court, must be held to have admitted the truth of each and every allegation of the petition and each and every favorable inference that can be drawn therefrom in favor of the petitioner. We can spell out of defendant's election to plead to the jurisdiction of the court rather than to traverse plaintiff's petition neither "an

agreement independent of any statute," nor an admission of liability on the part of the War Department, for death benefits owing to Kane's mother. We are not required, for the purpose of drawing inferences favorable to plaintiff, to close our minds to the knowledge that the War Department itself was not engaged in the insurance business, nor to the knowledge that but for some statutory authority, no undertaking to provide death benefits such as appears in the Shipping Articles under which Kane was employed would have been included therein. The procedural rule urged upon us by plaintiff is not to be applied with greater stringency to test defendant's plea to the court's jurisdiction than would be the case had defendant demurred to the petition.

In *United States v. Felin*, 334 U. S. 624, Mr. Justice Frankfurter had occasion to observe that "it is as old as the common law that an allegation purporting to be one of fact but contradicted by common knowledge is not confessed by a demurrer."

By neither the petition itself, nor by the Shipping Articles which plaintiff would have us read into his petition, does it appear that the War Department, incident to the exercise of its general power to engage the services of civilian employees as officers and crew members in its Army Transport Service, entered into a contract of insurance with such employees against loss of life by war risks. It is not alleged that the War Department itself insured Kane. In substance the petition merely asserts that the War Department agreed to provide Kane with such protection. Plaintiff's claim is not for a breach of that undertaking, for the petition asserts that Kane "accepted war risk benefits and insurance tendered to him by the statutes of the United States Government and the Rules and Regula-

tions of the Marine Personnel Regulations." No direct obligation on the part of the War Department to do more than what it apparently did in that connection is shown by the petitioner.

This is not to say, of course, that the statutes and regulations under which it is asserted such war-risk benefits and insurance were tendered to and accepted by Kane may not have given rise to an obligation that has the force of a binding contract with him. See *Lynch v. United States*, 292 U. S. 571.

It is entirely possible that the events which transpired leading up to plaintiff's claim may have been sufficient to give rise to an obligation on the part of the Government based upon statute to pay compensation for the death of Patrick J. Kane, Jr. If so, however, the statute itself may not be ignored in determining what remedies are provided for the discharge of the obligation. If the statute upon which the obligation is based leaves the determination of the benefits to be conferred solely to the discretion of the administrative body charged with its execution, or if it either withdraws or withholds from this court's jurisdiction the authority to entertain claims seeking to recover the benefits derived from the statute, the bare agreement by the War Department in its Shipping Articles with certain of its civilian employees that such benefits shall be provided may not be seized upon by this court as a means for exercising jurisdiction over a claim to such benefits, under the guise of exercising the general jurisdiction granted to it by Section 145 of the Judicial Code to hear and determine claims founded upon contract.

Our initial conclusion is, then, that the petition must stand, if at all, as a statement of claim founded upon the United States statutes and governmental regulations indi-



ated in paragraph "Fifth" of the petition, and that our jurisdiction to hear and determine the claim must be tested in accordance with defendant's plea that we are without jurisdiction with respect to claims arising thereunder. It has long been recognized that relief in the courts under the United States Employees' Compensation Act has not been authorized by Congress. *Dahn v. Davis, Agent, etc.*, 258 U. S. 421, 431. See also *Thomason v. Works Projects Administration*, 138 F. (2d) 342; *White v. Tennessee Valley Authority*, 58 F. Supp. 776. It is not our province here to decide whether, in a proper case, judicial review of administrative action taken under that Act may now be had in the courts by virtue of the "Administrative Procedure Act" of June 11, 1946, 60 Stat. Ch. 324, 5 U. S. C. 1001, notwithstanding such earlier decisions. Be that as it may, it does not appear from the petition that any action was taken before the administrative body charged with the execution of the Compensation Act to obtain such benefits as may have been available to plaintiff thereunder. So far as the allegations of the petition with reference to that Act are concerned there is nothing stated therein sufficient to invoke the jurisdiction of this court. It is not shown that any liability is admitted by the Federal Security Administration for benefits accruing under that Act. *McElhany v. United States*, 101 C. Cls. 286, is, therefore, not in point.

Turning then to the Merchant Marine Act of 1936, as amended, and more particularly to the provisions found in 46 U. S. C. 1128-1128h, covering insurance, to the administration of which provisions the Marine Personnel Regulations mentioned in the petition (i. e., subdivisions (a) and (c) of Division 121.1 thereof) were directed, we find that the Secretary of War was authorized during the war, and when necessary or advisable for military reasons, to pro-



cure from the U. S. Maritime Commission (and, during the time in question, from the War Shipping Administration), insurance covering loss of life sustained as a result of the risks of war by civilian crew members of American vessels operated by the War Department. Defendant's plea proceeds on the assumption that Patrick J. Kane, Jr., was insured by the War Shipping Administration against loss of life by the risks of war pursuant to this Act, and that plaintiff's petition was intended to assert a claim for loss on account of such insurance. But, defendant says, by virtue of section 1128d, an action on such claim may only be maintained against the United States in a District Court of the United States sitting in admiralty.

Section 1128d, entitled "Actions on claims for losses; jurisdiction of courts." provides in part:

In the event of disagreement as to a claim for losses or the amount thereof, on account of insurance under sections 1128-1128h of this title, an action on the claim may be brought and maintained against the United States in the district court of the United States sitting in admiralty in the district in which the claimant or his agent may reside, or in case the claimant has no residence in the United States, in a district court in which the Attorney General of the United States shall agree to accept service. Said suits shall proceed and shall be heard and determined according to the provisions of sections 741-752 of this title insofar as such provisions are not inapplicable and are not contrary to or inconsistent with the provisions of sections 1128-1128h of this title. \* \* \* [Sections 741-752 are contained in 46 U. S. C., Chapter 20, "Suits in Admiralty by or against vessels or Cargoes of United States."]

In this connection defendant directs our attention to *United States v. Leahy*, 148 F. (2d) 462, wherein it was stated (p. 466): "Determination of insurance claims is specifically within the exclusive jurisdiction of the District Court under section 225 of the Merchant Marine Act, 1936,

as amended, which provides actions are to be brought according to the provisions of The Suits in Admiralty Act, 41 Stat. 525, 1920, as amended, 46 U. S. C. A. sections 741-752", citing "*Brady v. Roosevelt S. S. Co.*, 317 U. S. 575; *Johnson v. U. S. Shipping Board Emergency Fleet Corporation*, 280 U. S. 320; *United States Shipping Board Emergency Fleet Corporation v. Rosenberg Brothers & Company*, 276 U. S. 202, and *Matson Navigation Co. v. United States*, 284 U. S. 352. In the *Leahy* case it was not necessary for the court to decide whether a claim for loss on account of insurance under the Merchant Marine Act of 1936, as amended, that is, under sections 1128-1128h of 46 U. S. C., could or could not be brought and maintained in the Court of Claims. Rather, the issue was whether under the particular facts of that case a suit could be maintained in the District Court. There appeared to have been a disagreement as to the amount the Government was obligated to pay on account of insurance covering the total loss of plaintiff's requisitioned tankers through enemy action. An action on the claim was brought in the District Court of the United States for the District of Delaware. The Government sought a writ of mandamus, or prohibition, or both, against the district judge, on the ground that the claim on which the suit was based was for "just compensation" and hence a matter exclusively for the Court of Claims. The Circuit Court of Appeals for the Third Circuit sustained the District Court's jurisdiction and denied the writ, seemingly satisfied that the district courts of the United States not only had jurisdiction over disputes arising out of the Government's wartime insurance business but were the only proper forum for determining such claims.

An examination of the Supreme Court decisions cited in the *Leahy* opinion appears to justify that conclusion. While none of those decisions was concerned with the particular

statute upon which plaintiff's claim here must rest, but rather with the Suits in Admiralty Act, approved March 9, 1920, 41 Stat. 525, 46 U. S. C. 741 et seq., the views therein expressed with regard to the purpose and intent of this latter act appear to us to be controlling in interpreting the purpose and intent of the Merchant Marine Act of 1936, as amended by the Act of April 11, 1942, 56 Stat. 214, 46 U. S. C. 1128-1128g, to provide war-risk insurance for masters, officers and crews of American vessels and other persons employed or transported thereon against loss of life. The latter act must be reviewed in *pari materia* with the Suits in Admiralty Act to which it makes specific reference. With reference to the Suits in Admiralty Act, any question that said Act, in addition to furnishing an exclusive remedy in admiralty, also prevented a resort to any concurrent remedies against the United States in the Court of Claims for the enforcement of the maritime causes of action covered by such Act (see *United States Shipping Board Emergency Fleet Corporation v. Rosenberg Brothers & Company*, *supra*) was removed by the Supreme Court's opinion in *Johnson v. U. S. Shipping Board Emergency Fleet Corporation* at page 327, where it was stated:

The analysis of the Act and the reasons on which rests our decision in *Fleet Corporation v. Rosenberg Bros.* apply here. Putting the United States and the Fleet Corporation on the same footing and providing remedies to be exclusive in admiralty would not serve substantially to establish uniformity if suits under the Tucker Act and in the Court of Claims be allowed against the United States and actions at law in state and federal courts be permitted against the Fleet Corporation or other agents for enforcement of the maritime causes of action covered by the Act. Such a failure of purpose on the part of the Congress is not readily to be inferred.

It will be observed that the court reached this conclusion regarding the Suits in Admiralty Act notwithstanding

the language employed in section 3 thereof (section 742 of Title 46 U. S. C.) that a libel in personam "may be brought" against the United States, preceding the provision that "such suits shall be brought" in the district court of the United States. It would be strangely inconsistent with the Supreme Court's conclusion in that case to now hold that, because section 1128d provides in event of disagreement as to a claim for loss on account of insurance under sections 1128-1128h of Title 46 an action on the claim "may be brought and maintained against the United States in the district court," preliminary to stating that "said suits shall proceed and shall be heard and determined" according to the provisions of the Suits in Admiralty Act, the claimant has the option of prosecuting his claim in the Court of Claims, if he sees fit. To so hold would be to leave such insurance claims outside the circle of that "complete system of administration" regarding maritime claims arising out of the possession or operation of merchant vessels of the United States "by which uniformity is established as to venue, service of process, rules of decision and procedure, rate of interest, and periods of limitation." *United States Shipping Board Emergency Fleet Corporation v. Rosenberg Brothers & Company, supra*. It would, moreover, do violence to the latter portion of section 1128d which was added by Act of March 24, 1943, Ch. 26, section 3 (g), 57 Stat. 50 (for brevity's sake not included in our quotation from said section, hereinabove) whereby the provision for hearing and determining suits on account of insurance claims according to the provisions of the Suits in Admiralty Act was supplemented by provisions for joining interested parties and in certain instances for an action by the United States in the nature of a bill of interpleader in the United States district courts, and a final sentence added to section 1128-d that "the procedure herein

provided shall apply to all actions now pending against the United States under the provisions of sections 1128-1128h, as amended."

We conclude that just as the Suits in Admiralty Act was held to have withdrawn from the Court of Claims certain of its jurisdiction (*Matson Navigation Co. v. United States, supra*) it is logical to conclude that the Supreme Court would determine that the Merchant Marine Act of 1936, as amended by the Acts of April 11, 1942, and March 24, 1943, withholds from the court jurisdiction over claims for losses on account of insurance under said act. It follows that the defendant's plea to the jurisdiction must be sustained and the plaintiff's petition dismissed. It is so ordered.

HOWELL, *Judge*; MADDEN, *Judge*; WHITAKER, *Judge*, and LITTLETON, *Judge*, concur.



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CHARLES E. HILL

# Supreme Court of the United States

October Term, 1948.

No. .... 536.1

SIDNEY S. LEVINE as Executor under the Last Will  
and Testament of ANNA M. KANE, Deceased,  
*Petitioner,*

v.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF CLAIMS.

## PETITIONER'S REPLY BRIEF.

+ SIDNEY S. LEVINE,  
*As Executor under the Last Will  
and Testament of Anna M. Kane,  
Deceased,  
In propria persona,  
277 Broadway,  
New York City, N. Y.*

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# Supreme Court of the United States

October Term, 1948.

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No. ....

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SIDNEY S. LEVINE as Executor under the Last Will  
and Testament of ANNA M. KANE, Deceased,  
*Petitioner,*

v.

THE UNITED STATES.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF CLAIMS.

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## PETITIONER'S REPLY BRIEF.

The entire substance of the Government's contention in attempting to defeat ~~its~~ claim of the petitioner is stated on Page 10 of the Government's brief as follows:

"This alleged contract is claimed to stem from the War Department's agreement in its Shipping Articles with the deceased employee to provide benefits for injury or death of crew members (Pet. 4).

That agreement, however, was nothing more than a statement by the War Department of its willingness to procure the necessary insurance protection for crew members from the Maritime Commission under the Merchant Marine Act, 1936."

The Shipping Articles was not an agreement to procure insurance, it was an agreement in and of itself to insure

the deceased. The Shipping Articles distinctly state that "the War Department agrees to provide benefits for injury, death and loss" of the officers and personnel of the crew and proceeds further to state as follows:

" \* \* \* If such person or any such beneficiary claims and receives the benefits payable hereunder, there shall be set off or credited against any such statutory benefits the amount such person or beneficiary receives hereunder."

Thus it is manifest that when the Shipping Articles refer to the "benefits payable hereunder", the Articles itself was the agreement. The Shipping Articles also refer to the statutory benefits and states very clearly

" \* \* \* If such person or such beneficiary claims and receives any such statutory benefit, there shall be set off or credited against the benefit provided hereunder, the amount such person or beneficiary receives as statutory benefit." (Pages 4-20-21 of Pet.)

The Government chooses to ignore this solemn agreement by stating in its brief that this agreement "was nothing more than a statement by the War Department of its willingness to procure the necessary insurance".

When a written document expressly states that the signatories thereto agree to do certain acts and the parties act thereon in addition to signing same, it is not a mere "willingness", but instead is an obligation to perform the act. Assuming that the Government was a domestic corporation and performed an *ultra virus* act in insuring the deceased, but the deceased in good faith acted thereon, the corporation would nevertheless be liable and the courts would never permit the defense of *ultra virus* to defeat the ends of justice.

Railroad v. McCarthy, 96 U. S. 258.

If the Sovereign Government of the United States was likened to that of a King it might be said that it would not be liable for its contract, as was said by Blackstone:

"We are therefore, out of reverence and decency, to forbear any idle inquiries, of what would be the consequence if the king were to act thus and thus: since the law deems so highly of his wisdom and virtue, as not even to presume it possible for him to do anything inconsistent with his station and dignity; and therefore has made no provision to remedy such a grievance." (Chase's Blackstone, Page 873.)

But those days have passed and our government has recognized almost from its inception that it is responsible for its contracts and has thus established a Court of Claims in furtherance of that principle.

Therefore, when the Attorney General states that the solemn agreement in the Shipping Articles that the War Department made with the deceased that it was nothing more than a statement by the Department of its willingness to do certain acts, it is tantamount to placing the government in the category of a King where he can disregard his obligation at his own whims and caprice.

The deceased had the dual right of statutory insurance as well as a common law right under the agreement.

Respectfully submitted,

SIDNEY S. LEVINE,  
*As Executor under the Last Will  
 and Testament of Anna M. Kane,  
 Deceased,  
 In propria persona.*



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# **In the Supreme Court of the United States**

OCTOBER TERM, 1948

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No. 536

SIDNEY S. LEVINE AS EXECUTOR UNDER THE LAST  
WILL AND TESTAMENT OF ANNA M. KANE, DE-  
CEASED, PETITIONER

v.

THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT  
OF CLAIMS

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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## **OPINION BELOW**

The opinion of the Court of Claims (Pet. 27-39)<sup>1</sup> is reported at 80 F. Supp. 674.

## **JURISDICTION**

The judgment of the Court of Claims was entered on November 1, 1948 (Pet. 27, 39). The petition for a writ of certiorari was filed on January 29, 1949. While the petition does not dis-

<sup>1</sup> All references herein are to the petition for a writ of certiorari inasmuch as the record was not separately printed but was incorporated into the petition.

close the basis for the jurisdiction of this Court, it is assumed that such jurisdiction is invoked under 28 U. S. C. 1255 (1).

#### QUESTION PRESENTED<sup>1</sup>

Whether the Court of Claims erred in declining to assume jurisdiction of a claim for war risk life insurance benefits where the statute authorizing the issuance of the insurance confines jurisdiction over such claims to the District Courts.

#### STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the applicable statutes and regulations are set out in Appendix A, *infra*, pp. 12-17.

#### STATEMENT

This case arises out of a claim for the benefits of war risk insurance issued by the Government on the life of a civilian employee of the War Department's Army Transport Service. The following statement summarizes the facts as alleged in the petition filed in the court below (Pet. 10-18):

From May 1944 to the date of his death, June 24, 1945, Patrick J. Kane, Jr. was a civilian em-

<sup>2</sup> The petition not only fails to state or specifically bring forward any question for consideration by this Court, but also fails to set forth the reasons relied on for the allowance of the writ of certiorari. This lack of compliance with the requirements of Rules 41 and 38 of the Rules of this Court would, in accord with the cases cited in Rule 38, par. 2, appear to be sufficient reason for denying the petition. See also, *Tiger v. Lozier*, 275 U. S. 496.



ployee of the War Department (Pet. 10-11). At the time of his death, which resulted from injuries sustained on June 19, 1945, while "under orders of the War Department,"<sup>3</sup> he held the position of Chief Engineer in the Army Transport Service of the War Department. His mother, who had been designated as beneficiary of any war risk benefits payable for loss of his life, died on January 10, 1946 (Pet. 10, 11, 12, 15-16).

On July 17, 1947, more than two years after Patrick J. Kane died, petitioner, as executor under the mother's will, instituted suit in the Court of Claims, claiming \$5,000 in war risk benefits and insurance (Pet. 10-14, 22). The petition in that court alleged that "pursuant to Public Law No. 267 of the Sixty-fourth Congress [i. e., the United States Employees' Compensation Act of September 7, 1916, 39 Stat. 742, 5 U. S. C. 751] and other governmental regulation the defendant agreed to insure the said Patrick J. Kane, Jr., for the sum of Five Thousand (\$5,000) Dollars if his death was sustained as the result of

<sup>3</sup> The nature of these orders is not set forth in the record but is revealed by a letter of August 4, 1947, from the Bureau of Employees' Compensation to the Department of Justice. That letter shows that on June 19, 1945, the deceased employee, while en route by rail from California to New York, became intoxicated in the Pullman car in which he was traveling and was soon thereafter found unconscious along the railroad right of way near Grand Junction, Iowa. A copy of the Bureau's letter is reprinted in Appendix B, *infra*, pp. 18-19.

the risk of war or war-like operations, and further agreed to insure his life for benefits of the United States Employees Compensation Act if death was sustained while in the performance of duty, as more fully provided for by subd. C. of the Marine Personnel Regulations<sup>4</sup>;” that Kane accepted the “war risk benefits and insurance tendered to him by the Statutes of the United States Government and the Rules and Regulations of the Marine Personnel Regulations \* \* \* and \* \* \* the same became a binding contract \* \* \*;” that his death resulted from injuries received “while on duty under orders from the defendants and while engaged in a warlike operation;” and that due proof of death was furnished but that defendants have failed to “pay the whole or any part of said insurance or death benefit.” (Pet. 11-13.) On February 4, 1948, the United States withdrew a general traverse it had formerly filed and entered a plea to the jurisdiction on the ground that the jurisdiction of the Court of Claims does not extend to claims founded on the United States Employees’ Compensation Act, or the Act of April 11, 1942 (56 Stat. 214), amending the Merchant Marine Act, 1936 (Pet. 3, 18). In opposing this plea petitioner argued that “there is in this particular case a dual or alternative right of insurance, one under the statute and the other under simple contract,” and that his

<sup>4</sup> The pertinent Marine Personnel Regulations are reprinted in Appendix A, *infra*, pp. 15-17.

claim is "based upon a simple contract of insurance," independent of any statute (Pet. 21, 23).

The Court of Claims, in a unanimous decision, ruled that the petition does not "reveal a claim founded upon a simple contract the terms of which must not in some part be found in the statutes and the regulations pursuant to which the several benefits claimed by plaintiff were made available" (Pet. 31). After so ruling, the court concluded that relief in the courts under the Employees' Compensation Act has not been authorized by Congress, pointing out, however, that even if it be assumed that Congress has made administrative action taken under that Act subject to judicial review in proper cases, the allegations of the petition would be clearly insufficient to invoke its jurisdiction, because they fail to show "that any action was taken before the administrative body charged with the execution of the Compensation Act to obtain such benefits as may have been available to plaintiff thereunder," or "that any liability is admitted by the Federal Security Administrator for benefits accruing under that Act" (Pet. 34). The court then held that if the claim be considered as one for insurance benefits under the Merchant Marine Act, 1936, as amended, only the District Courts may entertain jurisdiction thereof. The court accordingly sustained the plea to the jurisdiction and dismissed the petition (Pet. 34-39).

## ARGUMENT

The Court of Claims properly rejected petitioner's contention that it had jurisdiction over the instant claim for war risk life insurance benefits.<sup>5</sup> That contention is unsound because (1) jurisdiction of such claims is expressly confined to the District Courts, and (2) there is here involved no independent contract which would enable the Court of Claims to entertain the claim under its general contract jurisdiction. In addition, petitioner suggests no special or important reason for invoking the discretionary jurisdiction of this Court. We accordingly submit that review here by writ of certiorari is unwarranted.

1. Petitioner concedes that "there may be some weight" to the proposition that claims for war risk benefits under the Merchant Marine Act, 1936, as amended, are not cognizable in the Court of Claims (Pet. 23). That no doubt exists on

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<sup>5</sup> The petition filed in the court below refers to benefits under the Employees' Compensation Act as well as to war risk life insurance benefits (Pet. 11). However, this Court has held that the Employees' Compensation Act does not contemplate or provide for suits against the Government. *Dahn v. Davis*, 258 U. S. 421, 431. Furthermore, petitioner's brief in opposition to the Government's plea to the jurisdiction of the Court of Claims clearly shows that the claim is limited to the insurance benefits (Pet. 22-26), and, as the court below noted, the allegations of the petition filed in that court fail to show that application for relief under the Compensation Act was ever made to the administrative officers charged with the execution of that Act (Pet. 34).

that score is apparent from the express terms of that statute which vest jurisdiction in such cases in the District Courts. Section 225 of the Act states that "in the event of disagreement as to a claim for losses or the amount thereof, on account of insurance \* \* \* an action on the claim may be brought and maintained against the United States in the district court of the United States sitting in admiralty in the district in which the claimant or his agent may reside \* \* \*. Said suits shall proceed and shall be heard and determined according to the provisions of an Act \* \* \* (known as the Suits in Admiralty Act) \* \* \*." See Appendix, A, *infra*, pp. 13-14.

Even in the absence of the statutory requirement that the suits be heard in accordance with the provisions of the Suits in Admiralty Act, there would seem to be no doubt of the exclusive jurisdiction of the District Courts over the war risk insurance claims. In *United States v. Pfitsch*, 256 U. S. 547, this Court, in referring to statutory language almost identical to the authorization contained in Section 225 to sue in the District Courts, stated at p. 552:

it is significant that this is not the only occasion upon which Congress has provided for suits against the United States *exclusively in the District Courts*. Section 1 of the War Risk Insurance Act of May

20, 1918, c. 77, 40 Stat. 555, provides that suits upon [veterans'] insurance policies "may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any of them resides." \* \* \*

And Section 2 of the Act of July 11, 1918, c. 145, 40 Stat. 898, permits suits against the United States on marine insurance "in the district court of the United States, sitting in admiralty." [*Italics supplied.*]

Accord: *United States v. McGovern*, 299 Fed. 302, 303 (C. A. 9); *Mara v. United States*, 54 F. 2d 397, 399 (S. D. N. Y.); *McBean v. United States*, 80 C. Cls. 227.

Where, as here, the statute authorizing insurance claimants to sue the United States requires the bringing of such suits in accordance with the provisions of the Suits in Admiralty Act, there can be no question that the only proper forum is the District Court. Section 2, Suits in Admiralty Act, Appendix A, *infra*, p. 15. The exclusiveness of the District Court's jurisdiction under the latter Act is settled. *Matson Navigation Co. v. United States*, 284 U. S. 352, 356; *Johnson v. Fleet Corporation*, 280 U. S. 320; *United States Shipping Board Emergency Fleet Corp. v. Rosenberg Bros.*, 276 U. S. 202. And, the incorporation into Section 225 of the provisions of the Suits in Admiralty Act specifically confines the determination of insurance claims

under that Section within the exclusive jurisdiction of the District Court, precluding resort to any concurrent remedy in the Court of Claims. *United States v. Leahy*, 148 F. 2d 462, 466 (C. A. 3). The instant action, so far as we have been able to ascertain, represents the first endeavor to depart from the statutory requirement that war risk life insurance claims be prosecuted in the District Courts. Cf. *Crist, Administratrix v. United States War Shipping Administration*, 163 F. 2d 145 (C. A. 3), certiorari denied, 332 U. S. 852; *Reinold v. United States*, 167 F. 2d 556 (C. A. 2), certiorari denied, 335 U. S. 824; *Sorensen v. United States*, 69 F. Supp. 660 (S. D. N. Y.); *Quinn v. United States*, 72 F. Supp. 94 (D. Hawaii); *Sutton v. United States*, 73 F. Supp. 996 (N. D. Cal.); *Daranowich v. United States*, 73 F. Supp. 1004 (S. D. N. Y.); *Ferro v. United States Lines Co.*, 74 F. Supp. 250 (S. D. N. Y.)<sup>6</sup>

2. Petitioner, seeking to avoid the jurisdictional requirement of the Merchant Marine Act, 1936, argues that his claim is one founded on a common law contract of insurance independent

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<sup>6</sup> Petitioner recognizes (Pet. 21) that his suit is barred by the two-year limitation provision in the Suits in Admiralty Act (Section 5, 47 Stat. 420, 46 U. S. C. 745), which is carried over into Section 225 of the Merchant Marine Act. See *Sorensen v. United States*, 69 F. Supp. 660 (S. D. N. Y.). As indicated above, p. 2, Patrick J. Kane died on June 19, 1945, and suit was not filed until July 17, 1947.

of any statute and therefore cognizable in the Court of Claims under 28 U. S. C. 1491 (4).<sup>7</sup> This alleged contract is claimed to stem from the War Department's agreement in its Shipping Articles with the deceased employee to provide benefits for injury or death of crew members (Pet. 4).

That agreement, however, was nothing more than a statement by the War Department of its willingness to procure the necessary insurance protection for crew members from the Maritime Commission<sup>8</sup> under the Merchant Marine Act, 1936. As stated by the court below, "the War Department itself was not engaged in the insurance business \* \* \* [and] \* \* \* it is not alleged that the War Department itself insured Kane" (Pet. 32). Section 224 (b) of the Act, in fact, specifically authorizes the Commission to provide war risk life insurance at the request of the War Department. See Appendix A, *infra*, p. 13. The procurement of the war risk life insurance policy by the War Department from the proper governmental agency constituted, we submit, complete fulfillment by the Department of its obligation under the Shipping Articles. See *Murphy v. Gulf Oil Corporation*, 55 F. Supp.

<sup>7</sup> Formerly 28 U. S. C. 250 (1), Section 145 of the Judicial Code.

<sup>8</sup> By Executive Order 9054, 7 F. R. 837, the power of the Maritime Commission to write war risk insurance policies was temporarily vested in the War Shipping Administration.



962, 963 (E. D. Pa.). Petitioner's complaint is not that the War Department failed to procure such insurance (Pet. 32), but rather that he is entitled to recover its proceeds from the United States. This is the precise type of claim contemplated by Section 225 of the Merchant Marine Act, 1936 (Appendix A, *infra*, pp. 13-14) and is, therefore, cognizable only in the District Courts. Any other conclusion would, as pointed out by the Court of Claims, allow litigants to seize upon that court's general jurisdiction to hear contract claims as a device for avoiding the specific jurisdictional requirements of statutes under which the benefits are sought (Pet. 33).

#### CONCLUSION

The decision of the court below is clearly correct. It is not in conflict with any decision of this Court, and further review is not warranted. The petition for a writ of certiorari, which does not conform to the Rules of this Court,<sup>9</sup> should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,  
*Solicitor General.*  
 H. G. MORISON,  
*Assistant Attorney General.*  
 PAUL A. SWEENEY,  
 MORTON HOLLANDER,  
*Attorneys.*

MARCH 1949.

<sup>9</sup> See fn. 2, *supra*, p. 2.

## APPENDIX A

1. The pertinent provisions of the Merchant Marine Act, 1936, as amended (c. 240, 56 Stat. 214, c. 26, 57 Stat. 45, 46 U. S. C. 1128a, 1128c and 1128d) provide as follows:

SEC. 222. The Commission may insure against loss or damage by the risks of war, persons, property, or interests, as follows:

\* \* \* \* \*

(e) Masters, officers, and crews of such vessels and other persons employed or transported thereon against loss of life, personal injury, or detention by an enemy of the United States following capture.

(f) Statutory or contractual obligations or other liabilities of such vessels or of the owner or charterer of such vessels of the nature customarily covered by insurance; and, whenever the Commission shall insure any risks included under subsection (d) or (e) of this section, or under this subsection insofar as it concerns liabilities relating to the master, officers, and crews of such vessels or to other persons transported thereon, the insurance on such risks may include marine risks to the extent that the Commission determines to be necessary or advisable.

SEC. 224. (a) Any department or agency of the United States is hereby authorized to procure insurance from the Commission as provided for in sections 222 and 229 of this subtitle or in section 10 of the Merchant Marine Act, 1920, as amended, except as provided in the Government Losses in

Shipment Act, approved July 8, 1937, as amended (50 Stat. 479; U. S. C., Supp. VI, title 5, secs. 134 to 134h).

(b) The Commission is authorized to provide such insurance at the request of the Secretary of War or the Secretary of the Navy on a nominal premium basis in consideration of the agreement of the department concerned to indemnify the Commission against all losses covered by such insurance, and the Secretary of War or the Secretary of the Navy is authorized to execute such indemnity agreement with the Commission.

SEC. 225. In the event of disagreement as to a claim for losses or the amount thereof, on account of insurance under this subtitle, an action on the claim may be brought and maintained against the United States in the district court of the United States sitting in admiralty in the district in which the claimant or his agent may reside, or in case the claimant has no residence in the United States, in a district court in which the Attorney General of the United States shall agree to accept service. Said suits shall proceed and shall be heard and determined according to the provisions of an Act entitled "An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes", approved March 9, 1920, as amended (known as the Suits in Admiralty Act), insofar as such provisions are not inapplicable and are not contrary to or inconsistent with the provisions of this subtitle. All persons having or claiming to have an interest in such insur-

ance, or who it is believed might assert such an interest, may be made parties to such suit, either initially or upon the motion of either party. In any case where the Commission acknowledges the indebtedness of the United States on account of such insurance, and there may be a dispute as to the person or persons entitled to receive payment, the United States may bring an action in the nature of a bill of interpleader against the persons having or claiming to have any interest in such insurance, or who it is believed might assert such an interest, in the District Court of the United States for the District of Columbia, or in the district court in and for the district in which any such person resides. In either of such actions any person claiming to have an interest in such insurance, or who it is believed might assert such an interest, if not an inhabitant of or found within the district within which either of such actions is brought, may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct, and if it be shown to the satisfaction of the court that persons unknown might assert a claim on account of such insurance, the court may direct service upon such persons unknown by publication in the Federal Register. Judgment in any such action shall discharge the United States from further liability to any parties to such action, and to all persons where service by publication upon persons unknown is directed by the court. The procedure herein provided shall apply to all actions now pending against the United States under the provisions of this subtitle, as amended.

2. Section 2 of the Suits in Admiralty Act (c. 2, 41 Stat. 525, 46 U. S. C. 742) provides in pertinent part, as follows:

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. \* \* \*

3. Section 1, Regulation No. 12 of Marine Personnel Regulations, Transportation Corps, Army Service Forces (Pamphlet No. 4, July 1, 1944) provides as follows:

## SECTION 1

### GENERAL PROVISIONS

	Paragraph
Legal Basis.....	1
Explanation of Legal Basis.....	2

### *Legal Basis*

121.1 a. The Act of 11 April 1942 (Public Law 523—77th Congress) authorizes the Secretary of War to procure from the War Shipping Administration insurance covering the loss of life and disability

sustained as a result of the risks of war, by civilian crew members of vessels operated by the War Department.

b. The Employees' Compensation Act of 7 September 1916 (Public Law 267—64th Congress) provides that the United States shall pay compensation for disability or death of an employee resulting from a personal injury sustained while in the performance of duty.

### *Explanation of Legal Basis*

121.2 If disability or death is sustained by a crew member, not as a result of the risks of war or of warlike operations nor as a result of certain marine risks, the insurance procured from the War Shipping Administration shall not be payable, but the employee concerned shall be eligible for the benefits of the United States Employees' Compensation Act if the disability or death was sustained while in the performance of duty. On the other hand, if disability or death is sustained by a crew member as a result of the risks of war or warlike operations, the employee concerned or his beneficiary has an option as between war risk insurance benefits and compensation benefits. The U. S. Employees' Compensation Commission is by statute authorized to make final decisions, there being no appeal to a higher authority. The Compensation Commission has declared that it would, as a matter of policy, rule that any benefits paid under the Policy of Insurance would be offset against compensation benefits; i. e., if a beneficiary or beneficiaries elect to accept a lump sum payment of \$5,000.00 under the Policy of Insurance, no compensation benefits will

be paid until such time as the total monthly payments prescribed in the Compensation Act would total the amount of insurance benefits paid. After the expiration of such period, should the legal beneficiary or beneficiaries named in the Compensation Act still be eligible for compensation benefits, such benefits will be extended to execute in full the statutory obligation of the United States Government by reason of Public Law 267—64th Congress.

## APPENDIX B

### LETTER FROM BUREAU OF EMPLOYEES' COMPENSATION

AUGUST 4, 1947.

Honorable PEYTON FORD,  
*Assistant Attorney General,  
Department of Justice,  
Washington, D. C.*

DEAR MR. FORD: The Bureau received your request dated July 24, 1947, transmitting, as required by section 188 of the Revised Statutes, printed copy of the petition of Sidney S. Levine as executor, etc., against United States Government, et al., No. 45574, in the Court of Claims.

The Bureau's records show that one Patrick J. Kane, deceased, who was the son of Anna M. Kane, petitioner's testatrix, was employed as a chief engineer by the Army Transport Service and while en route by rail from California to the Port of New York sustained fatal injuries on June 19, 1945, from which he died on June 24, 1945. Investigation by the Bureau in connection with the claim for compensation under the Act of September 7, 1916, 39 Stat. 742, 5 U. S. C. sec. 751, et seq., filed by Anna M. Kane (and an alleged common law widow), showed that the deceased was intoxicated in the Pullman car on which he was traveling, and when last seen was asleep in the smoking compartment. He was not seen again until he was found unconscious



along the railroad right-of-way about two and one-half miles west of Grand Junction, Iowa. There was no direct evidence to show how, or why, the deceased left the car. The Bureau rejected the claim for compensation upon the ground that the injury was not sustained in the performance of duty. The Bureau, of course, had no claim filed with it relating to the claim filed by petitioner in the Court of Claims based upon the insurance agreement issued by the War Department covering the death of Patrick J. Kane from war risk hazards.

The Bureau's file contains numerous statements, reports, affidavits, certificates, interviews, and other documents obtained in connection with the investigation of the claim for compensation. If any information in the Bureau's file will be of assistance in the defense to the petition the Bureau will be pleased to furnish same upon request, or will make the file available for your inspection to ascertain whether you desire to have photostats of any parts thereof.

Very truly yours,

(S) H. P. MILLER,  
*Acting Chief Counsel.*